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PP

v.

TANG CHENG CHAI

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HIGH COURT MALAYA, ALOR STAR  
ZAMANI RAHIM JC  
[CRIMINAL APPEAL NO: 41-73-2007]  
1 SEPTEMBER 2009

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***CUSTOMS AND EXCISE: Prohibited goods - Smuggling offences - Customs Act 1967, s. 135(1)(c) - Appeal against acquittal and discharge - Whether approach taken by magistrate to consider defence case misplaced - Whether magistrate had properly directed herself on law and on facts - Whether appeal allowed - Order of forfeiture of vehicle - Customs Act 1967, s. 127***

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The charge proffered against the accused was under s. 135(1)(c) of the Customs Act 1967. On 2 January 2004, a team of customs officers consisting of SP1, SP2, SP3 and two others laid an ambush on a Toyota motor lorry bearing registration PBQ 1894 driven by the accused. A cursory examination of the goods in the said motor van was carried out and found to contain firecrackers and fireworks which were prohibited goods. At the end of the case for the prosecution, the presumption of knowledge of prohibited goods under s. 135(2) of the Act had been raised against the accused. The accused defence was called. However, after the accused entered his defence, the magistrate acquitted and discharged the accused. The magistrate seemed to have accepted the accused defence that he was not concerned in the conveyance and had no knowledge of the firecrackers and fireworks in the body of the lorry. The prosecution appealed.

**Held (allowing the prosecution's appeal; affirming the forfeiture order):**

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(1) The approach taken by the magistrate to consider the defence case was misplaced. She considered that the prosecution had failed to prove the accused had exclusive possession of the firecrackers and fireworks, the subject matter of the charge. It would appear that she had introduced the element of exclusivity of possession into the offence of knowingly concerned in the conveying of prohibited goods under s. 135(1)(e) of the Act. The magistrate had omitted to properly address her mind as to whether the defence had rebutted, on the balance of probability,

the presumption of knowledge under s. 135(2) of the Act rather than labouring on the issue of exclusive possession. This was a misdirection by way of a non-direction. (para 13)

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- (2) The magistrate had misdirected herself on the ingredient of the offence charged, she also had a jaundiced understanding of the law on burden of proof, be it on the prosecution and also on the defence. The magistrate had treated both burdens, that was, to rebut the presumptions on the balance of probability and to raise a reasonable doubt in the prosecution case as one and the same thing. She lumped them up together and made no distinction between the two burdens. (para 14)

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- (3) On the evidence, if the magistrate had properly directed herself on law and facts, she would not have arrived at the decision she did. Therefore, in the circumstances of the case, the accused was fined RM50,000 in default six months' imprisonment. Further, despite acquittal of the accused, the magistrate had made an order of forfeiture of motor lorry PBQ 1894 to the Customs Department. Section 127(1) was clear and unambiguous. It was mandatory that the court ordered forfeiture notwithstanding that there may be no conviction if the following two conditions were proved to the satisfaction of the court, namely (i) that an offence against the Act had been committed; (ii) that the goods were the subject matter of the offence and where the claim relates to the conveyance, such conveyance was used in the commission of the offence. (para 19)

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**Case(s) referred to:**

*Illian & Anor v. PP* [1988] 1 LNS 139 SC (*refd*)

*Keng Soon Finance Berhad v. Pegawai Kanan Kastam, Johore Bahru* [1981] 1 LNS 63 FC (*refd*)

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*Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC (*refd*)

*Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86 FC (*refd*)

*PP v. Guan Sheng Trading Sdn Bhd* [1996] 3 CLJ 298 HC (*refd*)

*PP v. Yuvaraj* [1968] 1 LNS 116 PC (*refd*)

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**Legislation referred to:**

Customs Act 1967, ss. 127(1), 135(1)(e), (2)

*For the appellant* - Nurul Ezwaney Husin DPP

*For the respondent* - Loo Yook Khin; M/s YK Loo & Cheng

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*Reported by Suhainah Wahiduddin*

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**JUDGMENT****Zamani Rahim JC:****The Charge**

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[1] The charge proffered against the accused was under s. 135(1)(e) of the Customs Act 1967 (the Act) which reads as follows:

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Bahawa kamu pada jam lebih kurang 11.50 malam pada 2.1.2004 di KM 10 Lebuhraya Bukit Kayu Hitam-Changlun, di dalam Daerah Kubang Pasu, Kedah Darul Aman dengan diketahui terlibat dalam mengangkut barang-barang larangan, iaitu 85 kotak mercun dan bunga api bernilai RM28,456.00 di dalam motor lori jenis TOYOTA nombor pendaftaran PBQ 1894. Barang-barang berkenaan adalah barang-barang yang dilarang diimport dibawah Perintah Kastam (Larangan Mengenai Import), 1998 kecuali dibawah dan dengan satu lesen import yang sah dengan niat untuk mengelak larangan tersebut dan telah melakukan suatu kesalahan dibawah Seksyen 135(1)(e) dan kamu boleh dihukum dibawah seksyen 135(1)(iii)(aa) Akta Kastam, 1967.

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[2] The accused claimed trial to the charge.

**Prosecution Case**

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[3] The prosecution's case is as follows: Acting on information received on 2 January 2004, at about 8.50pm, a team of customs officers consisting of SP1, SP2, SP3 and two others laid an ambush in front of Bank Simpanan Nasional, Changlun. They were on the look out for a Toyota motor lorry bearing registration No. PBQ 1894.

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[4] At about 11.50pm, the customs officers spotted the said motor lorry, PBQ coming from the direction of Kodiang, passed Changlun town and stopped at the traffic light. The customs officers tailed the said motor lorry until it was stopped at KM10, Lebuhraya Bukit Kayu Hitam/Changlun. SP1 approached the driver. He was the accused. The accused was alone. SP1 identified himself as a customs officer and requested the accused to unlock the padlock at the rear of the said motor lorry. The accused complied. A cursory examination of the goods in the said motor lorry was carried out and found to contain firecrackers and fireworks. Two handphones were also recovered. The firecrackers and fireworks are prohibited goods under the Customs Act, 1967.

[5] The said motor lorry was taken to the Customs Prevention store at Bukit Kayu Hitam where a thorough examination was conducted. As a result, a total of 85 boxes of firecrackers and fireworks were found. A police report was accordingly lodged *vide* Changlun Report No: 000005/04.

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[6] The case was investigated by SP4. His investigation revealed that motor lorry PBQ 1894 was registered under Perniagaan Heng Huan and its business was owned by Heng Poh Ngong. According to Heng Poh Ngong who had since passed away, he had rented the said motor lorry PBQ 1984 to one Ah Hock. Ah Hock could not be traced as information on him was lacking.

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[7] At the end of the case for the prosecution it is found that a *prima facie* case has been established. The presumption of knowledge of prohibited goods under s. 135(2) of the Act had been raised against the accused. The accused defence was called.

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### Defence Case

[8] The accused elected to give evidence on oath. In his defence he said that on the night of 2 January 2004 he was at home when his friend by the name of Ah Hock came to the house. Ah Hock came with a motor lorry. He invited the accused to drive him to Changlun to bring prawn crackers. Ah Hock promised to pay him RM100. The accused said he was not familiar with the road to Changlun. But Ah Hock accompanied him in the said lorry.

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[9] Upon arrival at the traffic light in Changlun, on the instructions of Ah Hock, he turned left. He continued driving the said lorry for about 2 - 3 kilometres when he stopped. Again he stopped on the instruction of Ah Hock. Soon thereafter, a motor van coming from the opposite direction had stopped beside his lorry. The driver of the said motor van unloaded boxes of prawn crackers into his lorry with the assistance of Ah Hock.

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[10] Having completed the transfer of the prawn cracker's boxes, the rear door of his lorry was locked. Again at the behest of Ah Hock, the accused turned back to Changlun town. Before reaching the traffic light, Ah Hock got down from the lorry and asked the accused to proceed with the journey and waited for him after the Balai Polis Changlun.

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- A [11] According to the accused, on reaching the traffic lights, he was stopped by a team of customs officers. A customs officer instructed him to unlock the lorry, which he did. Upon examining the lorry, the customs officer informed him of the goods in the van were not prawn crackers but firecrackers. Two handphones were found in the lorry. According to the accused, he informed the customs officers that the goods in the lorry and one of the handphones belonged to Ah Hock, the other was his. The accused denied having any knowledge of the firecrackers and fireworks in the body of the lorry.

C **The Decision Of The Magistrate**

- D [12] In acquitting and discharging the accused after the defence case, the learned magistrate seemed to have accepted the accused's defence that he was not concerned in the conveyance and had no knowledge of the firecrackers and fireworks in the body of the lorry PBQ 1894. He was only paid to drive the lorry by Ah Hock. According to the learned magistrate the existence of Ah Hock to whom the accused pushed the blame to, was probably true based on two grounds. Firstly, the seizure of two handphones from the lorry, one of which allegedly belonged to Ah Hock. Secondly, SP4's investigation disclosed that the owner of the motor lorry, PBQ 1894 was one, Heng Poh Ngoh. He had rented the vehicle to Ah Hock.

- F [13] The approach taken by the learned magistrate to consider the defence case was misplaced. She considered that the prosecution had failed to prove the accused had exclusive possession of the firecrackers and fireworks, the subject matter of the charge. It would appear that she had introduced the element of exclusivity of possession into the offence of knowingly concerned in the conveying of prohibited goods under s. 135(1)(e) of the Act. The learned magistrate had omitted to properly address her mind as to whether the defence had rebutted, on the balance of probability, the presumption of knowledge under s. 135(2) of the Act rather than labouring on the issue of exclusive possession. This is a misdirection by way of non-direction. Presumably, the learned magistrate had got mixed up with the element of exclusive possession which is commonly raised and familiar in the field of our drugs laws - Dangerous Drugs Act, 1952. This is how the learned magistrate put it.

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Setelah meneliti keseluruhan dalam kes ini Mahkamah mendapati pendakwaan gagal membuktikan tanpa keraguan yang munasabah bahawa tertuduh mempunyai “exclusive possession” ke atas barang kes yang dirampas.

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[14] Not only had she misdirected herself on the ingredient of the offence charged, she also had a jaundiced understanding of the law on burden of proof, be it on the prosecution, as manifested in the above passage, and also on the defence. In dealing with the burden on the defence, this was how she wrote:

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Di akhir kes pembelaan Mahkamah ini berpuashati dan mendapati bahawa di bawah imbangan kebarangkalian tertuduh telah berjaya timbulkan satu keraguan yang munasabah di akhir kes dan pendakwaan telah gagal membuktikan satu kes melampaui keraguan yang munasabah terhadap tertuduh. Oleh itu, Mahkamah telah melepaskan dan membebaskan tertuduh ini daripada tuduhan yang dikemukakan di akhir kes bela diri.

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[at p. 159 of the Appeal Record]

[15] It would appear the learned magistrate had treated both burdens, that is, to rebut the presumptions on the balance of probability and to raise a reasonable doubt in the prosecution case as one and the same thing. She lumped up both together and made no distinction between the two burdens. Accordingly, the learned magistrate found the accused not guilty, acquitted and discharged him. In the Supreme Court Criminal Appeal *Illian & Anor v. PP* [1988] 1 LNS 139, Wan Suleiman SCJ made the following observations as regard on the trial judge failure to draw the distinction of the two burdens:

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Regarding Yu, the judge said that he had not rebutted the presumptions on a balance of probability nor had he raised a reasonable doubt in the evidence led by the prosecution, and found him guilty. We must again perforce say that here again the learned judge appears to regard both burdens as being the same.

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Whilst we are on the same matter, his Lordship had even earlier shown that he made no distinction between the two burdens as would appear again and again in various parts of his judgment. To cite another example, under the heading “Court finding”, he had earlier recorded: “The court always borne in mind the onus on the defence is slight ie, to rebut the statutory presumptions on the balance of probability and to raise a reasonable doubt in the prosecution’s evidence.

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- A [16] In the light of several misdirections in law by the learned  
magistrate, I can do no better than to bring her attention to the  
exposition of the law on burden of proof as neatly laid down in the  
Supreme Court Criminal Appeal *Mohamad Radhi Yaakob v. PP*  
[1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 where Mohamed Azmi  
B SCJ said at p. 315:

C It is a well established principle of Malaysian criminal law that the  
general burden of proof lies throughout the trial on the prosecution  
to prove beyond reasonable doubt the guilt of the accused for the  
offence with which he is charged. There is no similar burden placed  
on the accused to prove his innocence. He is presumed innocent  
until proven guilty. To earn an acquittal, his duty is merely to cast  
a reasonable doubt in the prosecution case. In the course of the  
prosecution case, the prosecution may of course rely on available  
statutory presumptions to prove one or more of the essential  
D ingredients of the charge. When that occurs, the particular burden  
of proof as opposed to the general burden, shifts to the defence to  
rebut such presumptions on the balance of probabilities which from  
the defence point of view is heavier than the burden of casting a  
reasonable doubt, but it is certainly lighter than the burden of the  
prosecution to prove beyond reasonable doubt. To earn an acquittal  
E at the close of the case for the prosecution under s. 173(f) or s. 180  
of the Criminal Procedure Code, the court must be satisfied that  
no case against the accused has been made out which if unrebutted  
would warrant his conviction (*Munusamy v. PP*). If defence is  
called, the duty of the accused is only to cast a reasonable doubt in  
F the prosecution case. He is not required to prove his innocence  
beyond reasonable doubt.

- [17] The learned magistrate is also advised to read and  
comprehend the Privy Council case of *PP v. Yuvaraj* [1968] 1 LNS  
116 and the Federal Court case of *Ng Eng Kooi & Anor v. PP* [1970]  
G 1 LNS 86 relating to the quantum of proof on the accused to rebut  
the statutory presumptions on the balance of probabilities.

#### The Decision Of This Court

- H [18] On the evidence, if the learned magistrate had properly  
directed herself on law and facts, she would not have arrived at the  
decision she did. I, therefore, allowed the prosecution appeal. In the  
circumstances of this case, the accused was fined RM50,000, in  
default six months imprisonment.

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**Forfeiture**

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[19] Despite the acquittal of the accused, the learned magistrate had made an order of forfeiture of motor lorry, PBQ 1894 to the Customs Department. That called for the consideration of s. 127(1) of the Act.

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Section 127(1) provides:

- (1) An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made ... and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the Court that an offence against this Act or any regulation made thereunder has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

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[20] I am of the view that s. 127(1) is clear and unambiguous. It is mandatory that the court orders forfeiture notwithstanding that there may be no conviction if the following two conditions are proved to the satisfaction of the court, namely:

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- 1) that an offence against the Act has been committed.
- 2) i) that the goods were the subject matter of the offence, or  
ii) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.

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- see the judgment of Abdul Hamid FJ (as he then was) in *Keng Soon Finance Berhad v. Pegawai Kanan Kastam, Johore Bahru* [1981] 1 LNS 63; [1981] 2 MLJ 249 at p. 250.

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[21] In *PP v. Guan Sheng Trading Sdn Bhd* [1996] 3 CLJ 298 and the conclusion of his judgment, Abdul Malik Ishak J said at pp. 311 - 312 as follows:

The words 'notwithstanding that no person may have been convicted of such offence' appearing in s. 127(1) of the Act make it inevitable that the forfeiture cannot be avoided even if the accused was acquitted of the charge against him provided the trial court is satisfied that 'the goods were the subject matter of or were used in the commission of the offence'. As Syed Agil Barakbah J (as he then was) said in *PP v. Lee Wye Kheng (supra)*:

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- A** With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned president. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, ie, the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s. 127 of the Customs Act applies on all fours.
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**[22]** Accordingly, I affirmed the forfeiture order made by the learned magistrate.

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